

11 U.S.C. §362(d) (1)
28 U.S.C. §

1334(c) (1)

Cause
Abstention
Permissive

Abstention

Aetna Casualty & Surety Co. v. Brugger
94-6219-HO
In Re Brugger

Civ. #

Bankr. Case # 693-64570

9/12/94

Hogan reversing Radcliffe

Unpublished

Debtor filed Chapter 13 while a fraudulent conveyance action was pending in U.S. District Court for the Central District of California against her and her former husband (the action). The action sought to invalidate transfers encompassed in the marital settlement agreement entered into in Debtor's divorce. Aetna moved for relief from stay to continue the action until judgment, which the bankruptcy court denied. Aetna appealed to the U.S. District Court for the District of Oregon.

Held on Appeal: Reversed; automatic stay lifted

To determine whether cause exists to lift the stay to allow an action pending in another court to proceed in order to liquidate a claim, the court looked to the standards for permissive abstention as provided in 28 U.S.C. § 1334(c)(1), and the 12 factors set out in 9th Circuit case law. Considering the 12 factors, and noting that: 1) state law issues predominated the action;
2) the action was non-core and did not adversely effect the estate's administration; 3) Debtor's Chapter 13 petition appeared to be an effort to forum shop; 4) Aetna would have a right to a jury trial in the action; and 5) the action had non-debtor parties, the court determined that on balance, permissive abstention was warranted, and thus cause existed to grant relief from stay to litigate the action to judgment.

E94-14 (13)

U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
FILED

SEP 18 1994

TERENCE H. DUNN, CLERK
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FILED
SEP 12 1994

U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In re:

SANDRA G. BRUGGER,

Debtor,

AETNA CASUALTY & SURETY COMPANY,
a Connecticut corporation,

Plaintiff/Appellant,

vs.

SANDRA G. BRUGGER,

Defendant/Appellee.

Civil No. 94-6219-HO

Adversary Proceeding No.
93-64570

OPINION

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1 - OPINION

HOGAN, Judge:

Aetna Casualty & Surety Company appeals from the January 10, 1994 order of the bankruptcy court denying relief from the automatic stay. For the reasons stated below, the judgment is REVERSED and the stay is lifted.

PROCEDURAL BACKGROUND

Sandra Brugger filed a petition for relief under Chapter 13 of the Bankruptcy Code in Oregon on November 12, 1993. Aetna Casualty and Surety Company ("Aetna") immediately filed: 1) a motion to dismiss the petition, 2) a motion for a temporary restraining order, and 3) a motion to vacate the automatic stay. After a hearing on December 17, 1993 the bankruptcy court denied the motions by order dated January 10, 1994.

On January 13, 1994, Aetna filed a notice of appeal and an objection to Bankruptcy Appellate Panel determination. Accordingly, this court has jurisdiction pursuant to 28 U.S.C. § 158(a). Aetna has appealed only the denial of its motion to vacate the automatic stay.

STATEMENT OF FACTS

Throughout most of their marriage, Mr. and Mrs. Brugger resided in Northern California. At the hearing on the motions, Mrs. Brugger testified that in November of 1987 she moved to Oregon and began to live apart from her husband. By June 1988, Mrs. Brugger was residing permanently in Oregon, however, her husband joined her in May the following year.

Two years later, in June 1990, Mrs. Brugger filed a

1 petition in the Circuit Court of the State of Oregon to dissolve
2 her marriage. Mr. Brugger consented to the dissolution and
3 entered into a property settlement agreement with Mrs. Brugger
4 whereby Mrs. Brugger received about three-fourths of the couple's
5 assets, including Mr. Brugger's interest in six parcels of real
6 estate, deeds of trust, bank accounts, and other property worth
7 at least \$750,000. Mrs. Brugger waived any right to spousal
8 support.

9 Mr. Brugger filed a petition for relief under Chapter 13 of
10 the Bankruptcy Code in the District of Oregon on February 10,
11 1992; that petition was dismissed a short time later on the basis
12 of bad faith. Mr. Brugger subsequently filed, then voluntarily
13 dismissed, a second Chapter 13 bankruptcy petition. In March
14 1993 Aetna obtained a judgment for \$5,045,213 against Clayton
15 Brugger, Sandra Brugger's former husband, and others who
16 participated in a scheme to defraud Aetna from June 1987 through
17 June 1989. Mr. Brugger then consented to a default judgment in
18 Aetna's civil Racketeer Influenced and Corrupt Organizations Act,
19 18 U.S.C. § 1962, action against him, which was entered on March
20 30, 1993.

21 Aetna also filed a fraudulent conveyance action against Mr.
22 and Mrs. Brugger in the U.S. District Court for the Central
23 District of California in December 1992, seeking to invalidate
24 all of the property transfers encompassed in the marital property
25 settlement agreement. Mrs. Brugger filed a motion requesting
26 that the case be dismissed or transferred to the District of

1 Oregon; the motion was denied on July 29, 1993. During the
2 summer of 1993, Mrs. Brugger transferred approximately \$160,000
3 in cash to her son and \$10,000 to each of two grandchildren.

4 Mrs. Brugger filed a second motion to dismiss the
5 fraudulent conveyance action and Aetna responded by filing a
6 cross-motion for sanctions against Mrs. Brugger and her
7 California attorney for vexatious litigation tactics. The court
8 scheduled a December 6, 1993 hearing on the cross-motion. That
9 hearing was deferred, however, after Mrs. Brugger filed her
10 petition in this action.

11 STANDARD OF REVIEW

12 The bankruptcy court's decision to grant relief from the
13 automatic stay for cause under 11 U.S.C. § 362(d) is
14 discretionary and reviewed for an abuse of discretion. In re
15 MacDonald, 755 F.2d 715, 716-17 (9th Cir. 1985). The district
16 court must review the bankruptcy court's findings of fact under
17 the clearly erroneous standard, and its conclusions of law, de
18 novo. In re Mellor, 734 F.2d 1396, 1399 (9th Cir. 1984).

19 DISCUSSION

20 1. Abstention

21 Aetna charges that the bankruptcy court erred when it
22 refused to grant relief from the automatic stay, under 11 U.S.C.
23 § 362(d), so that Aetna's claims against Mrs. Brugger could be
24 liquidated in a separate action. Relying on In re Tucson
25 Estates, Inc., 912 F.2d 1162 (9th Cir. 1990), Aetna insists that
26 the bankruptcy court must abstain from hearing the fraudulent

conveyance action.

A. Waiver

As a preliminary matter, Mrs. Brugger contends that Aetna did not raise abstention as a basis for relief from the stay before the bankruptcy court and, therefore, is barred from doing so now. See, e.g., Abex Corp. v. Ski's Enterprises, Inc., 748 F.2d 513, 516 (9th Cir. 1984). According to Brugger, Local Bankruptcy Rule 4001-3(b) demands that the moving party state all facts that are relevant in determining whether relief should be granted in its motion before the bankruptcy court. She also argues that, at a minimum, this court would be unable to adequately resolve the abstention question because the record has not been developed sufficiently.

Under the law of this circuit, the district court has the authority to consider any issue presented by the record on appeal of a bankruptcy matter, even if the issue was not presented to the bankruptcy court. Pizza Hawaii, Inc. v. Shakey's, Inc., 761 F.2d 1374, 1379 (9th Cir. 1985); Fed. R. Bankr. P. 8013. Thus, because Aetna's challenge raises a legal issue and confronts matters within the record, this court will consider de novo the merits of Aetna's abstention argument.

B. Merits

Section 362(d)(1) provides, in relevant part, that: "[o]n request of a party in interest . . . the court shall grant relief from the stay . . . for cause." 11 U.S.C. § 362(d)(1) (1993). In the instance where a bankruptcy court may abstain from

1 resolving a question in favor of an imminent state court
2 proceeding involving the same question, cause may exist for
3 lifting the stay as to the state court trial. Tucson Estates,
4 912 F.2d at 1166.

5 The circumstances under which a bankruptcy court must
6 abstain and when it may abstain in favor of a state court
7 adjudication are set forth in 28 U.S.C. § 1334(c). Because the
8 parties are of diverse citizenship, thereby providing a separate
9 basis for adjudication of their fraudulent conveyance claim in
10 federal court, the mandatory abstention provision in section
11 1334(c)(2) does not apply in this case. See 28 U.S.C. §
12 1334(c)(2). Thus, the court need only consider the permissive
13 abstention grounds set forth in section 1334(c)(1). See id. at
14 § 1334(c)(1).

15 Section 1334(c)(1) provides that:

16 Nothing in this section prevents a district court in
17 the interest of justice, or in the interest of comity
18 with State courts or respect for State law, from
19 abstaining from hearing a particular proceeding
20 arising under title 11 or arising in or related to a
21 case under title 11.

22 The Ninth Circuit has adopted twelve factors that a court
23 must consider when deciding whether to abstain: 1) the effect on
24 the efficient administration of the estate if abstention is
25 recommended, 2) the extent to which issues of state law
26 predominate over bankruptcy issues, 3) the difficulty or
unsettled nature of the applicable law, 4) the presence of a
related proceeding commenced in state court or other
nonbankruptcy court, 5) the jurisdictional basis, if any, other

6 - OPINION

1 than 28 U.S.C. § 1334, 6) the degree of relatedness of the
2 proceeding to the main bankruptcy case, 7) the substance rather
3 than form of an asserted "core" proceeding, 8) the feasibility of
4 severing state law claims from core bankruptcy matters to allow
5 judgments to be entered in state court with enforcement left to
6 the bankruptcy court, 9) the burden of the bankruptcy court's
7 docket, 10) the likelihood that the commencement of the
8 proceeding in bankruptcy court involves forum shopping by one of
9 the parties, 11) the existence of a right to a jury trial, and
10 12) the presence in the proceeding of nondebtor parties.
11 Eastport Assoc. v. City of Los Angeles, 935 F.2d 1071, 1075-76
12 (9th Cir. 1991). After analyzing each of the factors under the
13 circumstances of the case at hand, the court must then balance
14 the competing the factors to determine whether abstention is
15 appropriate. Id. at 1079.

16 (1) Efficient Administration of the Estate

17 This is a neutral factor in this case. Mrs. Brugger's
18 petition is in essence a one creditor case and both parties agree
19 that Aetna's state claim against Mrs. Brugger must be liquidated
20 prior to holding a confirmation hearing in this case. Mrs.
21 Brugger's plan provides for monthly payments to the trustee in
22 the amount of \$450. The trustee will distribute \$50 and \$21 each
23 month to two secured creditors whose claims consist of property
24 taxes, with \$330 per month remaining and available for
25 distribution to Mrs. Brugger's unsecured creditors. Under the
26 circumstances, the litigation in California could proceed without

affecting the efficient administration of Mrs. Brugger's estate.

(2) State Law Issues Predominate

This factor weighs in favor of abstention. The case is governed entirely by state law; no bankruptcy issues are involved. Aetna's fraudulent transfer claims arise under California law. Also, the debtor asserts that issues of Oregon family law and property law are also relevant. Regardless, bankruptcy law is not relevant to liquidating Aetna's claims in this instance.

(3) Difficulty/Unsettled Nature of Applicable Law

This factor weighs against abstention. The fraudulent conveyance case does not involve unsettled issues of state law or matters of substantial public policy. Rather, the principles governing resolution of Aetna's fraudulent conveyance action are well-developed.

(4) Related Proceeding Commenced in Other Forum

This factor does not necessarily favor abstention. While it is true that the fraudulent transfer proceeding was commenced before Mrs. Brugger's bankruptcy petition was filed, that litigation has proceeded only to the judge's denial of Mrs. Brugger's change of venue motion. In fact, as the bankruptcy judge noted, Aetna has now before that court motions to compel discovery and is contemplating filing an amended complaint. The current posture of that litigation alone would not compel abstention.

(5) Jurisdictional Basis Other than Section 1334(c)

1 This factor does not favor abstention. The parties are of
2 diverse citizenship, thereby providing a separate jurisdictional
3 basis for the adjudication of Aetna's claim in federal court.
4 Thus, mandatory abstention is not appropriate and Aetna would
5 have had a federal forum for adjudication of its claim in any
6 event.

6 (6) Degree of Relatedness Between Proceedings

7 This factor does not necessarily favor abstention. Aetna
8 asserts that its fraudulent transfer action has no relationship
9 with the bankruptcy proceeding, except to establish Aetna's claim
10 against the debtor. Regardless, both parties agree that the
11 substance of Mrs. Brugger's petition is protection from the
12 claims of Aetna against her estate. Further, as stated earlier,
13 this is essentially a one creditor matter. The sole effect of
14 the California fraudulent transfer litigation will be to quantify
15 Aetna's claim against Mrs. Brugger's estate. Nevertheless, the
16 fact that the outcome of the California litigation will have an
17 impact on the final distribution of the estate assets does not
18 mandate that the bankruptcy court should resolve the issue.

19 (7) Substance of the Proceeding

20 This factor weighs in favor of abstention. Although 28
21 U.S.C. § 157(b)(2)(H) classifies proceedings to determine, avoid,
22 or recover fraudulent conveyances as core proceedings, it refers
23 to proceedings arising under Title 11 to recover assets
24 transferred out of the debtor's estate. Here, the fraudulent
25 conveyance litigation is an attempt by Aetna to recover assets

1 transferred into the debtor's estate and, therefore, placed
2 beyond its reach. While Aetna's case against Mrs. Brugger is
3 related to the bankruptcy because of its potential effect, it is
4 a non-core proceeding. See, e.g., Eastport Assoc., 935 F.2d at
5 1076-77.

6 (8) Feasibility of Severing State Law Claims

7 This factor weighs in favor of abstention. Mrs. Brugger's
8 Chapter 13 plan expressly contemplates a judicial resolution of
9 Aetna's claim followed by bankruptcy court enforcement. As
10 discussed, Mrs. Brugger's plan provides for monthly payments to
11 the trustee, with the trustee distributing payments each month to
12 the two secured creditors. In addition, there are funds
13 remaining and available each month for distribution to Mrs.
14 Brugger's unsecured creditors.

15 The plan then provides, in relevant part, that: "[u]pon
16 final determination of claims, debtor shall transfer to Aetna
17 property in kind which has been judicially determined to have
18 been fraudulently conveyed, if any, and shall liquidate assets
19 and pay all other creditors in full." Thus, in this instance,
20 it is quite feasible to abstain from deciding the state law claim
21 to allow judgment to be entered on that claim with enforcement by
22 the bankruptcy court without affecting the administration of the
23 estate. See Tucson Estates, 912 F.2d at 1169.

24 (9) Burden on Bankruptcy Court's Docket

25 This factor does not favor abstention. As discussed above,
26 prior to closing the hearing on Aetna's motions, the bankruptcy

1 court indicated its intention to move expeditiously through this
2 matter and, toward that end, a scheduling order was entered.
3 Presumably, the bankruptcy court set a schedule for this matter
4 after consideration of the demands of its docket.

5 (10) Forum Shopping

6 This factor weighs in favor of abstention. The procedural
7 posture of this dispute suggests that the debtor's action in
8 filing her petition was, in part, an attempt to achieve a
9 favorable forum for the resolution of Aetna's claim against her.
10 No doubt, Mrs. Brugger was entitled to file a Chapter 13 petition
11 in the District of Oregon. Nevertheless, on its face, Mrs.
12 Brugger's action of filing her petition in Oregon after her
13 change of venue motion was denied by the district court in
14 California, and the involvement of only one creditor in this case
15 give the appearance of forum shopping. See, e.g., Goya Foods,
16 Inc. v. Unanue-Casal, 164 B.R. 216, 223 (D. Puerto Rico 1993);
17 Republic Reader's Service, Inc. v. Magazine Service Bureau, Inc.,
18 81 B.R. 422, 430 (Bkrtcy. S.D. Tex. 1987).

19 (11) Right to Jury Trial

20 This factor weighs in favor of abstention. Aetna has the
21 right to and has demanded a jury trial in its California
22 litigation. Here, the bankruptcy court cannot conduct a jury
23 trial in this non-core matter. See Taxel v. Electronic Sports
24 Research, 916 F.2d 1444, 1450-51 (9th Cir. 1990). Moreover, in
25 a non-core proceeding, the bankruptcy court is constitutionally
26 restrained from entering final judgment. Id.; 28 U.S.C. §

157(c)(1). Thus, a de novo review by the district court of the
bankruptcy court's recommendation in this matter would be
mandated. Taxel, 916 F.2d at 1451; 28 U.S.C. § 157(c)(1). The
California court litigation would eliminate the de novo
consideration by two judges because the proceeding at the trial
level would be a final adjudication. See In re Craft
Architectural Metals Corp., 115 B.R. 423, 432 (E.D.N.Y. 1989).

(12) Presence of Nondebtor Parties in Proceeding

This factor weighs in favor of abstention. Both Aetna and
Clayton Brugger, Mrs. Brugger's former husband, are parties to
the fraudulent transfer action filed in California.

C. Summary

The court's review of the twelve factors indicates that, on
balance, abstention is appropriate in this case. The California
complaint is premised on state tort law theories. While a
judgment in favor of Aetna would have an impact on the
distribution of estate assets, in substance, it is a non-core
proceeding under 28 U.S.C. § 157(b)(3).

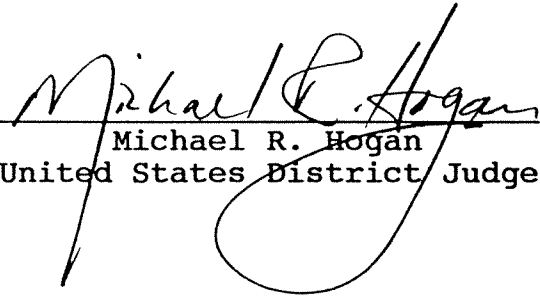
Distribution of any judgment obtained in the California
litigation has been considered and provided for by Mrs. Brugger's
Chapter 13 plan. Further, enforcement of any judgment will be
within the sole discretion of the bankruptcy court and governed
exclusively by Title 11, including the automatic stay provision
in section 362.

After Aetna's fraudulent conveyance claim is resolved, the
bankruptcy court can proceed with confirmation of Mrs. Brugger's

Chapter 13 plan, and the distribution of the funds. No doubt some delay will result from abstaining in favor of the federal court in California's resolution of the transfer issue, under the circumstances of this case, the delay will not impede the efficient administration of Mrs. Brugger's estate.

In addition, permissive abstention is appropriate given the procedural history of this case--the inference of forum shopping, Aetna's request for a jury trial, and the fact that the questions presented by the litigation are solely state law questions. Accordingly, I find that abstention authorized under 28 U.S.C. § 1334(c)(1) is proper. Therefore, the order of the bankruptcy court denying Aetna's motion for relief from the automatic stay is **VACATED** and the decision of the bankruptcy court is **REVERSED**. The stay is hereby lifted and the litigation pending in California will proceed.

Dated this 12th day of September, 1994


Michael R. Hogan
United States District Judge

U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
FILED

SEP 18 1994

TERENCE H. DUNN, CLERK

BY RD DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In re:

SANDRA G. BRUGGER,

Debtor,

AETNA CASUALTY & SURETY COMPANY,
a Connecticut corporation,

Plaintiff/Appellant,

vs.

SANDRA G. BRUGGER,

Defendant/Appellee.

Civil No. 94-6219-HO

Adversary Proceeding No.
93-64570

ORDER

HOGAN, Judge:

The order of the bankruptcy court denying Aetna's motion for relief from the automatic stay is VACATED and the decision of the bankruptcy court is REVERSED. The stay is hereby lifted and the litigation pending in the Central District of California will proceed.

IT IS SO ORDERED.

Dated this 12th day of September, 1994.

Michael R. Hogan
Michael R. Hogan
United States District Judge

1 - ORDER

FILED

& Entered

SEP 12 1994

U.S. DISTRICT COURT
FOR THE DISTRICT OF OREGON

SEP 12 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

AETNA CASUALTY & SURETY CO.

Plaintiff/Appellant,

v.

Civil No. 94-6219-HO
93-64570

SANDRA G. BRUGGER

Defendant/Appellee.

JUDGMENT

The order of the bankruptcy court denying Aetna's motion for relief from the automatic stay is vacated and the decision of the bankruptcy court is reversed. The stay is hereby lifted and the litigation pending in the Central District of California will proceed.

Dated: September 12, 1994.

Donald M. Cinnamond, Clerk

by

Lea Force

Lea Force, Deputy

JUDGMENT

DOCUMENT NO: _____